

# EXHIBIT A

JOHNSON V. MBNA NATIONAL BANK, N.A., CIV. ACTION NO. 3:02CV523  
(E.D.VA.), aff'd 357 F.3d. 426 (4th Cir. 2004).

TRIAL TRANSCRIPT CONTAINING INSTRUCTIONS TO THE JURY

18 here, MBNA is going to leave, go back to Delaware,  
19 and continue to do this again.

20 If you can come up with any other way other  
21 than making them pay a bill, if you can come with  
22 any other way to make MBNA change its policy so it  
23 doesn't happen to other consumers, so it doesn't  
24 happen to my client, make them come up with a  
25 different means of investigating, then more power  
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1 to you. And please, that is your job. But the  
2 only thing I know of, the only thing that will  
3 wake MBNA up and make someone redraft its policy  
4 instead of defending a law suit out in Vermont or  
5 Indiana somewhere, deal with these local lawyers  
6 like me, the only thing that will do it is to hit  
7 them.

8 You will be instructed that this company is  
9 worth a lot. It is worth so much that I can't  
10 with a straight face, and given my belief about  
11 some things like the McDonald's verdict that gives  
12 my profession a bad name, with a straight face  
13 even ask for what I would like to say. I would  
14 say one percent, a hiccup to the company, but one  
15 percent is astronomical. One percent would be  
16 \$77 million. So then one tenth of a percent,  
17 7.7 million, or one one hundredth of a percent,  
18 which might not even make a footnote in the annual

19 report, of \$770,000. \$770,000, one one hundredth  
20 of a percent should make someone in Delaware  
21 curious about what happened down here in Richmond,  
22 and should make someone want to look at the  
23 records and protect the credit report, not just of  
24 Mrs. Johnson, but of anyone else that is out  
25 there.

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1 You saw how many jury panel members had MBNA  
2 cards. I don't recall, some of you may have had  
3 MBNA cards. But if it happened to anyone, you can  
4 stop it today. We have asked for actual damages.  
5 The actual damages are at your discretion. We  
6 think the mortgage amount is 81 hundred. I would  
7 ask for ten times that in the amount of emotional  
8 and mental anguish and humiliation and the delay  
9 of her inability to get out of the house. But we  
10 would ask you to set an example or a punish,  
11 damage number that makes this company pay  
12 attention to us here in Richmond.

13 MR. GETCHELL: Your Honor, could I have an  
14 admonition to the jury these repeated references  
15 to Delaware and out-of-state are improper.

16 THE COURT: I will cover it in my charge.

17 MR. BENNETT: Thank you very much.

18 THE COURT: Ladies and gentlemen, now that  
19 you have heard the evidence and argument of  
20 counsel, it becomes my responsibility to instruct

21 you on the law applicable to this case. I give a  
22 general charge in all civil cases, and then after  
23 I give a general charge, I will instruct you on  
24 the substantive law that governs this case.

25 On the assumption all you of you aren't so  
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1 gifted you can remember verbatim what the  
2 substantive law is, you will have a copy of that  
3 to take back in the jury room, and I will give you  
4 further guidance as we go along.

5 You aren't to single out any one of my  
6 instructions as being controlling, but you are to  
7 consider them as a whole. And irrespective of any  
8 thoughts that you might have as to what the law  
9 ought to be, it would be a violation of your oath  
10 if you disregarded what The Court had to say and  
11 applied some law that you thought would be more  
12 appropriate.

13 You have been chosen as jurors, and you took  
14 an oath that you would try the issues that have  
15 been raised by the pleadings and the evidence, and  
16 the public expects you to do your duty without  
17 bias or prejudice and to render justice in the  
18 case between these litigants.

19 Also, under our system all entities that  
20 appear in a court of law are entitled to be  
21 treated equally, and it doesn't make any

22 difference whether it is a corporation that is  
23 organized in Delaware or Virginia, or it is an  
24 individual against a corporation or an individual  
25 against a partnership. They are all entitled to

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1 the same even-handed justice at the hands of a  
2 jury.

3 The burden is on the plaintiff in a civil  
4 action such as this to prove every essential  
5 element of her claim by a preponderance of the  
6 evidence. Now, preponderance of the evidence is a  
7 quantitative concept. All of you have seen the  
8 blind lady holding the scales of justice. As she  
9 holds those scales they are always in perfect  
10 balance. And whenever someone has the burden of  
11 proving something by preponderance of the  
12 evidence, it means that they have, their evidence  
13 tilts that perfect balance every so slightly in  
14 their favor. And that is a preponderance.

15 There are generally speaking two types of  
16 evidence from which a jury may properly find the  
17 truth as to the facts of the case. One is direct  
18 evidence, such as the testimony of an eye witness.  
19 And the other is independent or circumstantial  
20 evidence, which is the proof of a chain of  
21 circumstances pointing to the existence or non  
22 existence of certain facts. As a general rule,  
23 the law makes no distinction between direct and

24 circumstantial evidence. And, ladies and  
25 gentlemen, bear in mind that the system recognizes  
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1 that the eight of you bring to the jury box your  
2 accumulated common sense of a lifetime, and we  
3 expect you to use your common sense in reaching a  
4 decision in this case, just as you do on a daily  
5 basis in making other important decisions.

6 Exhibits are considered direct forms of  
7 evidence. Arguments and statements of counsel are  
8 not evidence, unless the attorneys enter into a  
9 stipulation, and if they enter into a stipulation  
10 you can accept that stipulation as a fact in the  
11 case.

12 From time to time in their arguments the  
13 lawyers may have stated what law was applicable to  
14 the case. If what they made reference to differs  
15 from what The Court said, disregard what they had  
16 to say altogether and literally apply the law as  
17 stated by The Court. Also, the lawyers from time  
18 to time may have made reference to what the  
19 witnesses testified to. If their recollection  
20 differs from yours, then ignore entirely what they  
21 said and make your own determination. But we have  
22 so much confidence in the jury system that we rely  
23 a hundred percent upon you to make a determination  
24 of the facts in the case.

25       You as jurors are the sole judges of the  
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1     credibility of the witnesses and the weight that  
2     their testimony deserves. You may be guided by  
3     the appearance and conduct of the witness or by  
4     the manner in which the witness testifies, or by  
5     the character of the testimony given. You should  
6     carefully scrutinize all the testimony, the  
7     circumstances under which each witness has  
8     testified, and every matter in evidence which  
9     tends to show whether a witness is worthy of  
10    belief. Consider each witness' intelligence,  
11    motive, and state of mind and demeanor and manner  
12    while on the stand. Consider the witness' ability  
13    to observe the matter to which the witness  
14    testifies, and whether the witness impresses you  
15    as having an accurate recollection of these  
16    matters. Consider, also, any relation each  
17    witness may bear to each side of the case, the  
18    manner in which each witness might be affected by  
19    your verdict, and the extent to which, if at all,  
20    each witness is either supported or contradicted  
21    by other evidence in the case.

22       Inconsistencies or discrepancies in the  
23    testimony of a witness or between the testimony of  
24    different witnesses may or may not cause you to  
25    discredit such testimony. Two or more persons  
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1   witnessing an incident or transaction may see or  
2   hear it differently. And innocent  
3   misrecollection, like failure of recollection, is  
4   not an uncommon experience. In weighing the  
5   effect of the discrepancy, always consider whether  
6   it pertains to matters of importance or an  
7   unimportant detail and whether the discrepancy  
8   results from innocent error or intentional  
9   falsehood. After making up your own judgment, you  
10   will give the testimony of each witness such  
11   weight, if any, as you think it deserves.

12       On occasion it was suggested that a witness  
13   may have given a prior inconsistent statement when  
14   the witness' deposition was taken in a prior  
15   situation. If such is shown, it could be  
16   considered for purposes of impeaching the witness'  
17   testimony. Before discounting a witness'  
18   testimony for this reason you ought to consider  
19   whether the inconsistency was of a minor,  
20   insignificant nature, or something material to the  
21   case.

22       A verdict cannot be based upon surmise,  
23   speculation, or sympathy for either party, but  
24   must be based solely upon the evidence and the  
25   instructions of The Court.

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1       Now, that concludes my general charge, and  
2   while you breathe a collective sigh of relief I



3 will take a drink of water, and then I will  
4 instruct you on the substantive law.

5 The plaintiff, Linda Johnson, is suing the  
6 defendant, MBNA America Bank, N.A., for damages  
7 alleging that the defendant negligently and  
8 willfully violated the Fair Credit Reporting Act,  
9 15 U.S.C. section 1681. The plaintiff claims that  
10 the defendant violated the Fair Credit Reporting  
11 Act because she claims that after receiving notice  
12 from three credit reporting agencies that the  
13 plaintiff was disputing the identity and balance  
14 of an MBNA account. The defendant failed to  
15 review all of the information provided by the  
16 credit reporting agencies, failed to investigate  
17 the plaintiff's disputes, and failed to report  
18 back to the agencies the result its investigation.  
19 The defendant denies that it violated any  
20 provision of the Fair Credit Reporting Act. The  
21 defendant claims that it reviewed all of the  
22 information provided by the credit reporting  
23 agencies, investigated the plaintiff's disputes,  
24 and reported back to the these agencies the  
25 results of an investigation. The plaintiff claims  
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1 first, that the defendant negligently failed to  
2 comply with the Fair Credit Reporting Act in  
3 failing to review all of the information provided

4 by Experian, Equifax and TransUnion; failing to  
5 conduct a reasonable investigation of her  
6 disputes, and failing to accurately report back to  
7 these agencies the result of its investigation.  
8 To establish her claim that the defendant  
9 negligently failed to comply with the Fair Credit  
10 Reporting Act the plaintiff must establish the  
11 following elements by a preponderance of the  
12 evidence: One, that the defendant negligently  
13 failed to, A, conduct an investigation with  
14 respect to the disputed information B, review all  
15 relevant information provided by the consumer  
16 reporting agencies; or C, report the results of  
17 the investigation to the consumer reporting  
18 agencies; and two, that the plaintiff was damaged;  
19 and three, that the negligence of the defendant  
20 proximately caused the damage suffered by the  
21 plaintiff.

22 Your verdict will be for the defendant if you  
23 find that the plaintiff fails to establish any one  
24 of the three elements.

25 Negligence as used in these instructions  
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1 means the failure to do something which a  
2 reasonably prudent person would do, or the doing  
3 of something which a reasonably prudent person  
4 would not do under the circumstances which you  
5 find existed in this case.

6 It is for you to decide what a reasonably  
7 prudent person would do or not do under the  
8 circumstances as they existed in this case. In  
9 other words, you must determine whether the  
10 defendant's investigation of the disputed  
11 information was reasonable. The term "proximate  
12 cause" as used in these instructions means that  
13 there must be a connection between the conduct of  
14 the defendant that the plaintiff claims was  
15 negligent and the damage complained of by the  
16 plaintiff, and that the act that is claimed to  
17 have produced the damage was a natural and  
18 probable result of the negligent conduct of the  
19 defendant.

20 If your verdict is for the plaintiff on the  
21 claim of negligent non compliance, then your duty  
22 is to determine the amount of money that  
23 reasonably, fairly, and adequately compensates her  
24 for the damage that you decide resulted from the  
25 defendant's failure to comply. Whether the  
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1 element of damages has been proved by the  
2 plaintiff is for you to decide based upon evidence  
3 and not upon speculation, guess or conjecture.  
4 Damages for embarrassment, humiliation and mental  
5 anguish will not be presumed to have occurred, but  
6 the plaintiff must prove that they did occur, and

7 the plaintiff, while it is not obligated to prove  
8 it with mathematical precision, they must give you  
9 sufficient raw material so that you can make an  
10 intelligent estimate of it. And, also, the burden  
11 is on the plaintiff to mitigate her damages, and  
12 if you feel that any evidence shows that she had  
13 an opportunity to lessen those damages and she  
14 didn't take advantage of it, then you can take  
15 that into consideration, also.

16 The plaintiff's second claim is that the  
17 defendant willfully failed to comply with the Fair  
18 Credit Reporting Act in failing to review all of  
19 the information provided by Experian, Equifax and  
20 TransUnion. Failing to investigate her disputes  
21 and failing to report back to these agencies the  
22 result of its investigation to establish her claim  
23 that the defendant willfully failed to comply with  
24 the Fair Credit Reporting Act the plaintiff must  
25 establish the following elements by a

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1 preponderance of the evidence. Bear in mind we  
2 are now talking about willfully doing something,  
3 whereas the first claim was negligently doing  
4 something. That the defendant willfully failed  
5 to, A, conduct an investigation with respect to  
6 the disputed information; B, review all relevant  
7 information provided by the computer reporting  
8 agencies; or C, report the results of the

9 investigation to the consumer reporting agency.  
10 If the plaintiff fails to prove one of these  
11 three, A, B or C, you should find your verdict for  
12 the defendant.

13 The term "willfully" as used in these  
14 instructions means that the defendant knowingly  
15 and intentionally committed an act in conscious  
16 disregard for the rights of the consumer and not  
17 by mistake or accident or other innocent reason.  
18 A showing of malice or evil motive is not required  
19 to prove willfulness. MBNA was required to  
20 conduct a reasonable investigation. Factors to be  
21 considered in determining whether MBNA has  
22 conducted a reasonable investigation include  
23 whether the consumer has alerted MBNA that its  
24 information may be unreliable; and two, the cost  
25 of verifying the accuracy of the information

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1 versus the possible harm of reporting inaccurate  
2 information. The standard for such an  
3 investigation is what a reasonably prudent person  
4 would do under the circumstances. And evaluating  
5 the reasonableness of MBNA's investigation  
6 involves weighing the potential harm from  
7 inaccuracy against the burden of safeguarding such  
8 inaccuracy. The damage that Mrs. Johnson may  
9 recover for MBNA's alleged failure to investigate

10 a claim of inaccuracy of the record or to report  
11 the results of its investigation may not include  
12 any damages that were caused by the inaccuracy of  
13 the information itself.

14 Damages to be recoverable are limited to  
15 those, if any, arising from a willful or negligent  
16 failure to conduct any investigation or to report  
17 the results. Damages recoverable for willful non  
18 compliance with the fair credit reporting act are  
19 two kinds. First, there are damages that are  
20 actually suffered by reason of the wrong  
21 complained of. Second, there are punitive  
22 damages, which means damages over and above the  
23 actual damages, if any, suffered by the plaintiff.  
24 These are damages that may be awarded by you in  
25 your discretion for the purpose of punishing the

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1 defendant for the wrong done. Punitive damages  
2 also serve as an example to others not to engage  
3 in such conduct. If you find that MBNA willfully  
4 failed to follow reasonable procedures in its  
5 investigation of the plaintiff's dispute, you must  
6 award her the actual damage she sustained as a  
7 result of the defendant's failure. If you find  
8 that MBNA willfully failed to follow reasonable  
9 procedures in its investigation, and also find  
10 that the plaintiff suffered no actual damage or  
11 actual damages of less than a hundred dollars,

12 then you must award the plaintiff at least a  
13 hundred dollars, but not more than one thousand  
14 dollars.

15 If you as a juror further find that the acts  
16 or omissions of the defendant that proximately  
17 caused the actual injury or damage to the  
18 plaintiff were willfully done, then you may, if in  
19 the exercise of your discretion, you unanimously  
20 chose to do so, add to the award of actual damages  
21 such amount as you shall unanimously agree to be  
22 proper as punitive damages. Whether or not to  
23 make any award punitive damages in addition to  
24 actual damages is a matter exclusively within your  
25 province.

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1 You should bear in mind not only the  
2 conditions under which and the purpose for which  
3 the law permits an award of punitive damages to be  
4 made, but also the requirement of the law that the  
5 amount of such punitive damages must be fixed with  
6 calm discretion and sound reason, and must never  
7 be either awarded or fixed in amount because of  
8 any sympathy, bias or prejudice with respect to  
9 any party. You may consider the defendant's net  
10 worth in connection with punitive damages, and I  
11 believe their net worth at 12/31/01 was  
12 7.7 million. And also under the law there should

13 be a rational relationship between punitive  
14 damages, if you elect to award any, and the  
15 plaintiff's actual damages.

16 The Fair Credit Reporting Act is not  
17 required, does not require that credit card  
18 account records, including original applications,  
19 be kept in any particular form; however, the law  
20 does prohibit MBNA from maintaining its record in  
21 such manner as to consciously avoid knowing that  
22 information it is reporting is accurate.

23 A corporation may act only through natural  
24 persons as its agents or employees, and in general  
25 any agent or employee of a corporation may bind  
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1 the corporation by his acts and declarations made  
2 while acting within the scope of his authority  
3 delegated to him by the corporation, or within the  
4 scope of his duties as an employee of the  
5 corporation.

6 If a corporation has established a standard  
7 of procedure for the accomplishment of an act, it  
8 is relevant to proving that it acted in a specific  
9 instance in conformance with that standard of  
10 procedure. And here again, you have heard  
11 evidence that everybody is getting electronic now  
12 days, and it is up to you to decide whether that  
13 is a reasonable way to conduct your business or  
14 not.



15 Now, that concludes my substantive charge.

16 MR. GETCHELL: May we approach?

17 BENCH CONFERENCE

18 MR. BENNETT: It is 7.7 billion.

19 THE COURT: Did I say million? I meant  
20 billion.

21 MR. GETCHELL: I think on instruction number  
22 12 you said "accurate" instead of "inaccurate."

23 THE COURT: Okay.

24 MR. GETCHELL: And you had something that was  
25 not here, not printed, but you put in something,  
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1 if the "plaintiff," sounded like "the defendant,"  
2 had failed to prove. If you will instruct the  
3 plaintiff has the burden on everything.

4 THE COURT: I told them that the plaintiff  
5 failed to prove.

6 IN OPEN COURT

7 THE COURT: On my instruction number 12,  
8 ladies and gentlemen -- you will have a copy of  
9 it -- counsel tells me that I used the word  
10 "reporting is accurate," and it should have been  
11 "inaccurate." You will have it in printed form.

12 Isn't that your complaint, counsel?

13 MR. GETCHELL: Yes, Your Honor.

14 THE COURT: All right.

15 Your first order of business when you go back

16 in your room is to select a foreperson. It is  
17 that individual's responsibility to preside over  
18 your deliberations and see that each juror is  
19 given full opportunity to express their views and  
20 participate in your verdict. The verdict must  
21 ultimately be unanimous. The foreperson's vote  
22 counts no more than any other. You will have in  
23 addition to the charge a verdict form. It says,  
24 we, the jury, unanimously find as follows. Did  
25 the defendant MBNA negligently fail to comply with  
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1 the reporting act? It has, yes, no. If you  
2 answer yes, proceed to question two. If the  
3 answer is no, proceed to question three. And  
4 then, did the defendant's conduct proximately  
5 cause plaintiff's damage? If yes, you plug in a  
6 number. And then you would go to whether MBNA  
7 willfully failed to comply with the Fair Credit  
8 Act. And then you have the same sort of questions  
9 after that.

10 Now, from time to time during the course of  
11 your deliberations you may need to communicate  
12 with The Court. If you do, Mr. Winn will be  
13 sitting outside the jury room. Knock on the door  
14 and he will come in. And if you have a question,  
15 that should be in writing and signed by the  
16 foreperson. If it's something I can help you  
17 with, I will bring you back in and give you

18 further guidance. Also, after you have reached a  
19 verdict, the foreperson has to sign it and date  
20 it. Knock on the door and let Mr. Winn know you  
21 have reached a verdict. I will bring you back in  
22 and receive it and send you home. I leave it up  
23 to jurors to determine their work hours after they  
24 start deliberating, but I will tell you now that  
25 if you haven't reached a verdict by 6:30 or 7:00 I  
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1 will send you home for the evening because they  
2 close down here at night, and I don't want you to  
3 freeze up there in the jury room.

4 Everyone remain seated while the jury  
5 departs. And see that you take your handouts with  
6 you because you will now need those.

7 I will get you the instructions back in due  
8 course.

9 (Jury withdrew)

10 THE COURT: Before you put anything else on  
11 the record, let me warn you that I am about to go  
12 into some arrangements, and I would hate to  
13 mistake you for one of the defendants in the case.  
14 So do you have anything further to put on the  
15 record, Mr. Bennett?

16 MR. BENNETT: No, Your Honor.

17 THE COURT: Mr. Getchell.

18 MR. BENNETT: Although I didn't do it.

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